APIL briefing: Judicial Review and Courts Bill - Part Two Chapter Four: Coroners – House of Commons Second Reading – October 2021

Missed opportunity to support bereaved families

It is difficult for most of us to imagine what it must be like to lose a loved one because of an incident which could have been avoided. When it does happen, families go through what is probably the most difficult time of their lives. They need support to help them through it, but they also need answers about why their loved one was killed. A coroner's inquest can be vital in revealing those answers. The bereaved family can have a very important part to play in ensuring an inquest reaches an accurate and fair conclusion. It is also important for bereaved families to be involved in inquests so they are able to hear, first hand, what happened, which can be a critical factor in helping bereaved people find closure and ultimately to try to move on in their lives. Such involvement, however, comes at a price, and it is a price that many bereaved families cannot afford to pay.

The proposals in the Bill lack safeguards to ensure families are not denied the answers they need after the death of a loved one, while missing completely from the Bill is a change which would ensure there is a level playing field for families at inquests which involve public bodies. This would be achieved by ensuring legal aid is available for families at inquests where public authorities are legally represented. Legal representation can be a critical factor in helping families through inquests, which they can often find complex and difficult to understand, but many families cannot afford this help. Without changes to the legislation, the Judicial Review and Courts Bill will be a missed opportunity to support bereaved families.

Importance of legal representation

A coroner has a duty to investigate any death where the cause is unknown, the person might have died a violent or unnatural death, or died in police custody or any other state detention. For this investigation and any subsequent inquest to be conducted fairly, a coroner must be as impartial as possible. A coroner cannot be on the side of the bereaved family any more than he or she is on the side of the other parties involved.

Families, who will be unfamiliar with the inquest process, will usually have to face organisations which will almost certainly have legal representatives who are experienced with the process. The coroner's office will ensure families are aware of practical arrangements for the investigation and inquest, but cannot give the family legal advice.

Without legal representation, families will be on their own. In some cases, they will have to review reams of documents which could include distressing information about their loved one's death. It cannot be right that any bereaved family is left to deal with these painful documents on their own, or is expected to know what is vital evidence and what should be challenged. Legal representation ensures families ask the right questions and call the appropriate witnesses at the inquest. If families are unable to do this, they might be left without the answers they need, or the closure which can come from an inquest.

The coronial process is designed to be inquisitorial, and this has been used as a justification for families not requiring legal representation[1], but coroners can take an aggressive line and shut down questioning. An example of this behaviour was seen in a case reported by one of our members, where the coroner's combative, sarcastic and terse tone caused the bereaved family serious distress, and undermined their faith in the coroner's ability. Fortunately, in this case, the family had legal representation, and the coroner was replaced under threat of judicial review. If they had not been represented, they would have been unable to do that, and may have accepted the outcome that the coroner presented in the first instance, which did not consider the wider circumstances of their daughter's death.

Legal aid for inquests

The last thing any family should have to worry about during their search for answers are the costs associated with an inquest. No family should be priced out of justice, or find the truth too expensive to secure. Regardless of their own financial situation, families should have a right to feel on equal ground at an inquest. There can be, however, a serious inequality of arms. Often, families will face hospitals, the police, local authorities or other public bodies which have legal representation funded by the public purse. Even in cases where these bodies do not officially have representation, they are likely to have assistance, either through in-house legal professionals or specialist inquest officers.

[1] Ministry of Justice, A Guide to Coroner Services for Bereaved People, page 16, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859076/guide-to-coroner-services-bereaved-people-jan-2020.pdf

At the very least, their witnesses will be experienced professionals such as doctors, who will have been provided with advice from a legal team prior to the inquest. Yet a family suffering a bereavement is likely to be refused the same publicly-funded legal aid.

Families can apply for legal aid, but it will be granted only in limited circumstances. Legal aid will be granted under the Government's exceptional funding scheme if it is considered there is a wider public interest in the inquest, or if it is an Article 2 inquest. An Article 2 inquest is held when there is a death in state custody, or if it can be argued that the State failed to protect someone's right to life. Currently, families must also meet a financial means test if they are to be granted legal aid under this scheme.

We welcome the Government's recent commitment to remove the financial means test in applications for exceptional case funding (ECF) which it made in its response to a report from the House of Commons Justice Select Committee into the coroner service[2]. This commitment, however, does not go far enough. It is the experience of our members that even before the financial situation of families is considered, it is rare for applications for ECF to be successful, especially in healthcare-related inquiries. The removal of the financial means test alone is unlikely to be of benefit to many families. The Government must go further and accept in full the committee's recommendation for legal aid or other public funding for legal representation to be available for bereaved people in inquests where public authorities are legally represented[3].

In the absence of legal aid, some of our members help bereaved families by funding representation through a conditional fee agreement (CFA - otherwise known as 'no-win, no-fee') but this funding arrangement has to be linked with a separate civil claim for compensation. If a CFA is not possible, legal representation is either provided free of charge by a lawyer, which can be unsustainable for law firms, or a family has to fund its own representation. This is simply unaffordable for many families. Legal aid which is not means tested provides families with the certainty that there will be a level playing field at the inquest, and they will not be alone during the most difficult period of their lives. It should be available for all.

[2] The Coroner Service: Government Response to the Justice Committee's First Report, September 2021 https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/675/67502.htm
[3] Justice Select Committee, First Report of Session 2021-22, The Coroner Service, May 2021, https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/68/6812.htm#_idTextAnchor107

Need for safeguards

Bereaved families will need even more legal support if proposals in chapter four of part two of this Bill are implemented. The Government has said these proposals "will reduce unnecessary procedures in coroner's courts and help address the backlog of cases which have accumulated during the pandemic"[4]. We support this aim, but there must be safeguards in this Bill to ensure it is not at the expense of a family's fight for answers about their loved one's death

Clause 37 will broaden the circumstances in which a coroner can discontinue an investigation if the cause of death becomes clear. A coroner can only base the decision on a post-mortem, but this will allow an investigation to be discontinued if the cause of death becomes clear through other evidence. When an investigation is discontinued, bereaved families must be given a full explanation about why the decision was made. Currently, a written explanation only has to be given if requested by an interested person, such as the family. This is not good enough. A written explanation must always be given to a bereaved family as standard, not just on request.

It is important to recognise that there will be families who will have legitimate reasons not to agree with the decision to discontinue an investigation. In these instances, there should be formal appeals process for those families who want an investigation to continue. This will be important where, for example, families have reason not to agree with the cause of death, which is what happened in the case of Noreen Clements.

In May 2016, Mrs Clements suffered a fractured pelvis after falling in hospital, and died two weeks later. Her family were adamant that it was the fall and resulting injury which led to her death, but this was not recorded when the doctors completed the medical cause of death which was sent to the coroner. This was raised by the family's legal representative on the first day of the inquest after a detailed review of the medical records, and the coroner asked the doctors to reconsider the death certificate. The doctors maintained their previous position that the facture was not a direct cause of her death. An independent expert instructed by the coroner, however, gave his opinion that Mrs Clements "died from hospital acquired pneumonia resulting from both pelvic fractures and underlying kidney and cardiac disease".

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004585/jr-courts-bill-fact-sheet-courts-short-version.pdf

The coroner subsequently confirmed “that there had been a failure of the hospital to complete a falls care plan and implement it prior to her fall, despite recognising that she was at risk of falling”[5].

In this case, the family were fortunate that the coroner acted on their concerns. Another coroner may have been satisfied with the medical cause of death before the inquest, and under these proposals could have discontinued the investigation. Mrs Clements’ family would never have been given the answers they deserved. Nor would the hospital’s failings have been identified, missing an opportunity for changes to be made to ensure current and future patients are kept safe from avoidable harm.

Clause 38 will give coroners the flexibility to hold an inquest without a hearing in non-contentious cases. Instead, coroners would issue a written conclusion. We agree this will be suitable in some cases, but clear guidance must be issued by the Chief Coroner to ensure coroners use this provision only when it is appropriate. It should not be used solely by coroners as a convenient tool to hurry cases along. The involvement of the family in the decision is vital, and we welcome the requirement for the coroner to invite representations from them about whether the hearing should be in writing.

If implemented, however, this proposal will be yet another reason why legal representation and support is so important. It will ensure families do not agree to a written hearing when it is not appropriate. Some families may not feel confident enough to make a suitable representation without help, or may not appreciate that there are aspects in the case which mean a physical hearing should take place. This may only be recognised by an experienced legal professional. In the interests of the principle of open justice, which allows anyone to attend any inquest, we also recommend the publication of the list of hearings which will be conducted in writing, as well as the written rulings.

Remote hearings

Clause 39 will allow for pre-inquest reviews and inquests to take place where all participants, including the coroner, can participant remotely. There is no denying that technology has advanced so much in recent years that it is possible to conduct a coroner’s inquest online, but this should not mean that online hearings become the norm.

[5] https://www.coventrytelegraph.net/news/coventry-news/hospital-criticised-coroner-after-pensioner-12895914

It may be suitable for a pre-inquest review, which is an administrative hearing to make decisions about the inquest, to be held online. It may even be suitable for non-contentious inquests, or uncontested evidence to be given online, but it will not be suitable for all inquests.

This clause should be amended to require the agreement of families before an inquest is held online. Inquests can help provide closure for grieving families, and it is the experience of our members that for some families, part of that closure can be achieved by physically being in court. This also allows families to be supported by their legal representatives, not just professionally, but also emotionally. This could be difficult if they are in different locations. Some families may not have internet access, or have an internet connection which is not good enough to allow them to take part in an online hearing. These families must not be excluded.

While we agree that there is some place for remote hearings, either partly or in full, we are opposed entirely to hearings or evidence being conducted by audio only. Without being able to see a witness who is being questioned during the inquest, it will be impossible to know if that person is being prompted on what to say by someone else. Nor will the coroner or anyone else get a sense of the body language of the witness, which could be used to help question his or her credibility.

Limitation period

Not all families who go through an inquest will make a separate civil claim for compensation. For those who do, there is a three-year limitation period from the date of their loved one's death to make a claim, or a one-year limitation period if the claim is made under the Human Rights Act 1998. This may seem like a long time, but some families may decide to make a claim only after the inquest has finished. Some inquests, however, can take a considerable amount of time, limiting the time available for a separate legal claim. This Bill should be amended to support those families.

During the Coronavirus pandemic, NHS Resolution, which manages legal claims for the NHS, agreed a Covid-19 Clinical Negligence Protocol which said the "limitation period will be suspended for three months for any claims identified either before or after the conclusion of the inquest hearing"[6]. A suspension of the limitation period for all cases while an inquest is ongoing should be permanent and formalised in law through this Bill.

[6] https://resolution.nhs.uk/wp-content/uploads/2021/06/Covid-19-Clinical-Negligence-Protocol-2020.pdf

Currently, solicitors can request an extension to the limitation period if it is expected that an inquest will reduce the time available to make a claim, but there is no guarantee that such a request will be agreed. A suspension of the limitation period before an inquest has concluded will bring certainty to families that they will not be out of time and denied what is their legal right to pursue a civil claim.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit campaign group which has been committed to injured people for more than 30 years. Our vision is of a society without needless injury but, when people are injured, they receive the justice they need to rebuild their lives. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics, who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter.

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